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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 564-51

BENJAMIN P. SHEIN, ET AL.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.,
Defendants,

and

INTERSTATE COMMON CARRIER COUNCIL OF MARYLAND, INC.,
Intervener

(Filed March 13, 1952)

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final decree of the District Court entered in this cause.

Opinion Below

The opinion of the United States District Court for the District of New Jersey is presently not reported in the reporter system but may be found in Federal Carriers

Cases (CCH), Vol. 8, par. 80,734, p. 2415. A copy of the opinion, of the findings of fact and conclusions of law and of the final decree of January 15, 1952, are attached as Appendix A.

Jurisdiction

This is an action to set aside two orders of the Interstate Commerce Commission brought under Title 28, United States Code, sections 1336 and 2321-2325, inclusive. The final decree of the District Court was entered January 15, 1952. A petition for appeal is presented to the District Court herewith on March 13, 1952. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the decree on direct appeal in this case: *United States* v. *Rock Island M. Trans. Co.*, 340 U. S. 419, 426; *Radio Corp. of America* v. *United States*, 341 U. S. 412, 414; *United States* v. *Hancock Truck Lines*, 324 U. S. 774; *American Trucking Associations* v. *United States*, 326 U. S. 77.

Questions Presented

In substance, section 5(2) and (4) of the Interstate Commerce Act (49 U. S. C. 5(2), (4)) makes it unlawful for any motor carrier subject to the Act to purchase the properties or any part thereof, of another such carrier without the approval and authorization of the Interstate Commerce Commission. If the Commission finds that the proposed transaction "will be consistent with the public interest," it shall enter an order approving and authorizing the transaction. In passing upon any such transaction, the Commission is directed to give weight, among other things, to the effect of the transaction upon adequate transportation service to the public. The question presented here is

whether the Commission may deny or withhold its approval of a transaction for the acquisition by one motor carrier of the operating rights of another where the only evidence on the subject in the record is that the acquisition would result in public benefit by reason of quicker and more efficient transportation service; particularly where the basis of the Commission's denial is that the carriers had not proved a public need for the unified service, although each of the carriers had theretofore established that its respective service was required by the public convenience and necessity, as evidenced by certificates of public convenience and necessity issued by the Commission.

An important related question is whether the Commission may lawfully predicate its denial or withholding of approval and authorization of such transaction upon mere conjecture or conclusions of fact which were not established or supported by any evidenec, to the effect that the proposed service would compete with existing carriers "operating in an already highly competitive territory" and would have "a probable adverse effect" upon such carriers. Otherwise stated, did the Commission deny plaintiffs due process of law by a denial or withholding of approval and authorization under such circumstances?

A third question is whether the trial court in upholding Commission findings upon material matters, unsupported by any evidence, ignored and failed to comply with the mandate of the Administrative Procedure Act requiring the court to review such findings and the order based thereon in the light of the whole record.

All the points raised in the assignment of errors are also presented. The questions above stated present the major issues.

Statutes Involved

Sections 5(2)(a)(b)(c), 5(4)(10)(13), and 207(a) of the Interstate Commerce Act, as amended (49 U. S. C.

5(2)(a)(b)(c), 5(4)(10)(13) and 307(a)), are copied in Appendix B.

Statement

Shein's Express, Trenton, N. J., a partnership consisting of the plaintiffs-appellants Shein, all brothers, operates in interstate or foreign commerce under certificate MC-80504, as a motor common carrier of general commodities, with exceptions, over regular routes between New York City and Wilmington, Del., principally via Newark and Trenton, N. J., and Philadelphia, Pa., serving all intermediate and certain off-route points including those within 20 miles of Philadelphia not included in the Trenton area.

Wesley Stillwell, Media, Pa., a partnership consisting of plaintiffs-appellants Wesley Stillwell, Frank Charles Laxton and Charles Robert Lewis, Jr., operates in interstate or foreign commerce under certificates MC-93789, MC-93789 (Sub-No. 2) and MC-93789 (Sub-No. 3) as a motor common carrier (1) of general commodities, excepting, among others, household goods as defined in 17 M. C. C. 467, over irregular routes, between points in Aston and Middletown Townships, Delaware County, Pa., on the one hand, and, on the other, points in New Jersey, Delaware, Maryland, the District of Columbia, and those in New York, N. Y., Commercial Zone as defined in 1 M. C. C. 665, (2) of general commodities, with exceptions, over a regular route, between Fernwood and Wawa, Pa., over U. S. Highway 1, etc., restricted to service auxiliary to, or supplemental of, railway service, and (3) of household goods, as previously defined, over irregular routes, between Media and points within 15 miles thereof, on the one hand, and, on the other, points in eight named States on the eastern seaboard and the District of Columbia.

By an application filed June 9, 1949, and assigned No. MC-F-4185, plaintiffs-appellants sought the approval and

authorization of the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act for the purchase by vendee, Shein's, of that portion of vendor Stillwell's operating rights in MC-93789 (Sub-No. 2) authorizing operation as a common carrier by motor vehicle over irregular routes of general commodities, with exceptions, between points in Aston and Middletown Townships, on the one hand, and, on the other, points in Delaware, Maryland and the District of Columbia.

Hearing was held before a Commission examiner wherein plaintiffs-appellants, the intervener Interstate Common Carrier Council of Maryland, Inc., and certain railroads appeared. Plaintiffs-appellants adduced oral and documentary evidence in support of the application through three witnesses: Wesley C. Stillwell, Phillip Shein and an accountant. Intervener and the railroads, although opposing the application, introduced no evidence but confined themselves to cross-examination of plaintiffs' witnesses. See plaintiffs' exhibit P-1, being a transcript of the proceedings before the Commission.

The examiner in his report recommended an order approving and authorizing the proposed transaction (Complaint Ex. C). Upon exceptions filed by the intervener, and plaintiffs' reply, Division 4 of the Commission issued its report and order of March 6, 1950, "which in substance adopted the recommendations of the examiner, with a few minor changes, approving the transfer sought therein." District Court Opinion, sheet 5.

In this report, the Division found in pertinent part:

> "Vendees presently transfer daily at Philadelphia to connecting carriers, principally Transfer and Davidson, one to two truckloads of southbound general commodity traffic destined to points in Delaware, Maryland, and the District of Columbia. The interchange has not been satisfactory to vendees because the con-

necting carriers in most instances render a through service between New York City and Baltimore and provide a competitive service with them between New York City and Philadelphia. Invariably one day of transit time is lost as a result of the interchange.

"• • • Under the unified rights, using points in those townships as gateways, vendees propose to provide single-line through service between points presently served by them in their regular-route operations and those in the irregular-route territory to be acquired from vendors. *Shippers and consignees would benefit from the resulting elimination of interchange at Philadelphia and by the reduction in transit time of one day.*

• • • • • • •

"The evidence shows clearly that vendees intend to preserve the separate nature of the regular-route and irregular-route operating rights and to move traffic between the areas covered thereby only through points in Aston and Middletown Townships as gateways. *Operations by vendees in the manner proposed* to the extent hereafter indicated (which extent is not pertinent here) *would be lawfully permissive.* • • • Competition for through traffic between New York City and Baltimore and other points would undoubtedly be intensified as a result of the proposed unification. Vendors have not interchanged traffic with any carrier and their operations have been of little competitive significance in the considered territory. *The added competition of vendees, who perform a more aggressive service than vendors would very likely cause interveners to lose some traffic and revenue. In the absence of evidence by interveners, however, showing how they would be affected by the transaction, there is no basis for a finding that their service is adequate or that it would be seriously affected by the proposed operations of vendees.* Compare Pacific Frt. Lines-Lease and Pur.-Hurlbert and Keyes, 5 M. C. C. 625." (Parenthetical matter and italics supplied.)

Thereupon, the Division found and concluded that the transaction "will be consistent with the public interest" and entered an order approving it. Complaint Ex. D.

Upon a petition for reconsideration filed by intervener, to which plaintiffs replied, the same Division reopened the proceeding for reconsideration on the record as made, issued a second report and order dated July 24, 1950, in which it reversed the examiner and itself. In that report, it was said that intervener was contending that the service proposed by vendees would in effect be an entirely new operation, detrimental to existing carriers, and that the record evidence did not support a finding that it would be in the public interest. Declaring that it was necessary only to review the evidence insofar as it relates to this contention, the Division, *in all other respects,* adhered to the views in the prior report.

The Division stated that upon further review of the evidence, it was not convinced that approval of the transaction would be consistent with the public interest. It found that the evidence established that vendors' operations in general commodity transportation had been confined to a call-on-demand nonscheduled service between points in the base area (the Townships) and points in the radial territory; that vendees had never interchanged traffic with any carriers; that it is apparent that such operations have been of little competitive significance in the considered territory. The Division went on to find *inter alia:*

> "• • • Furthermore, it becomes more apparent that the use to which vendees would put the radial irregular-route operating rights would bear little if any resemblance to the service provided by vendors, and that such use would result, under the unified rights, in the institution of an essentially new and different service by vendees in competition with existing carriers operating in already highly competitive territory."

As further basis for its ultimate conclusion, the Division noted the lack of evidence "of a positive nature" showing adverse effects the transaction would have on existing carrier operations, the lack of evidence to justify a finding that shippers have a need for the new and additional service proposed by vendees, that the loss of through traffic to competitors with single-line services warrants the conclusion that existing carriers are able to meet the needs of the shipping public; that existing carriers would lose substantially all the traffic interchanged at Philadelphia with vendees (approximately 30,000 to 60,000 lbs. southbound, ½ truckload northbound, both per day) and "probably" would lose additional traffic by reason of the competitive service which vendees propose to render.

And so the Division concluded:

> "Considering the radical change in the pattern of the operations which would be conducted by vendees under the operating rights involved, the probable adverse effect which this would have on competing carriers, and the lack of evidence to show that the transaction would supply any need of the public not now being adequately met by other carriers, we are of the opinion that consummation of the transaction would not be consistent with the public interest"

and ordered denial of the application. Complaint Ex. E, reported in 56 M. C. C. 711.

Plaintiffs-appellants filed a petition for reconsideration of said report and order in which they asserted, in substance, the same contentions and arguments made to the District Court. Intervener replied, and the Commission by its order of April 2, 1951, denied the petition. Complaint Ex. F.

Plaintiffs-appellants brought this action under Title 28, United States Code, sections 1336 and 2321-2325, to review the decision and rulings of the Commission and to set aside

its report and order of July 24, 1950, and its order of April 2, 1951, upon the ground that they and the underlying findings:

a. Are not based upon or supported by any, or any substantial evidence;

b. Are contrary to all of the evidence of record;

c. Are contrary to law, in that they constitute a misapplication and nonapplication of the provisions of the Interstate Commerce Act;

d. Are arbitrary, capricious, unreasonable and constitute an abuse of discretion.

At the hearing before the District Court of three judges, plaintiffs introduced in evidence as exhibit P-1 a complete transcript of the proceedings before the Commission (except as to some immaterial procedural orders). Interstate Common Carrier Council of Maryland, Inc., leave granted, intervened as a defendant and filed its answer. Upon the pleadings and proof, oral argument and briefs of the respective parties, the Court rendered a written opinion, made findings of facts and conclusions of law and entered a final decree dismissing the action.

The Court concluded as a matter of law that the Commission accorded plaintiffs a full and fair hearing, ignored no material evidence offered by plaintiffs, and did not act arbitrarily with respect to the proof submitted to it; that the Commission did not err: in reconsidering and reversing its previous report upon the same evidence; in holding that the burden was on plaintiffs to show the public need of such service not then being adequately met by other carriers, in finding that vendees proposed to conduct a radically changed operation from that conducted by vendors, in concluding that the proposed change in operations would be injurious to existing carriers endangering the public need (sic), in

its report and order of July 24, 1950, denying the application; that the Commission did not abuse its discretion in denying reconsideration; and that the complaint should be dismissed.

The Questions Are Substantial

The Certificates of convenience and necessity held by Shein and Stillwell are conclusive evidence of the fact that the public convenience and necessity require the carrier service which may lawfully be performed thereunder. By virtue of those certificates, authorizing as they do service at common points or gateways in the Townships, Shein and Stillwell have the right in combination to perform a through service between points on their respective lines. Section 216(c) of the Interstate Commerce Act authorizes common carriers by motor vehicle to establish reasonable through routes and joint rates. Such routes may be established over a combination of regular and irregular routes so long as the essential character of the respective routes is preserved. Upon unification of such operating rights in a single ownership, the holder may perform the through service as a single-line affair. These propositions have been long recognized and acted upon by the Commission. Aetna Freight Lines, Inc., Interpretation of Certificate, 48 M. C. C. 610, 611; Fitterling Transp. Co., Inc.-Pur.-Kansas City-Ill. Exp. (1942), 38 M. C. C. 709, 712. Unifications, always involving proposals to render single-line through services, have been approved by the Commission in numerous cases without any proof that the shipping public needed such service or that public convenience and necessity required it. A few of such cases are: Fitterling Transp. Co., Inc.-Pur.-Kansas City-Ill. Exp., *supra;* Steffke-Pur.-Ziffrin (1942), 36 M. C. C. 371, 38 M. C. C. 639; Herrin Transp. Co.-Pur.-Coleman (1939), 35 M. C. C. 88; Penn Ohio New York Express Corp.-Pur.-Tri-Service (1940), 35 M. C. C. 305; Transamerican Freight

Lines-Pur.-Gorman (1938), 5 M. C. C. 712, 713. And approval has been granted in such cases even though vendor and vendee had not as between themselves heretofore established or maintained a through or joint-line service. Herrin Transp. Co.-Pur.-Coleman, *supra;* Fitterling Transp. Co. Inc.-Pur.-Kansas City-Ill. Exp., *supra;* Lee Way Motor Freight, Inc.-Merger (1939), 25 M. C. C. 520, 523.

In the foregoing cases and many others like them, a showing of the benefits to accrue to the public from the through service by elimination of the inconveniences and delays arising from interchange of traffic between carriers and benefits to be enjoyed by the carrier by increase in revenues, abolition of work and worry and other demands to satisfy interchange requirements was held to establish that the unification and the proposed through service are consistent with the public interest. Insistence of opposing carriers, adversely affected by proposed unifications, that such consistency was not shown unless a public need for the through service had been established has been overruled repeatedly by the Commission.

To the same effect are the decisions of the Commission and a three-judge District Court, W. D. Mo., in Powell Bros. Truck Lines, Inc.-Pur.-Bryan (1943), 39 M. C. C. 11, and *Byers Transp. Co.* v. *United States* (1943), 49 F. Supp. 828. In the Powell case, the Commission said that "a change in ownership which will enable existing rights to be used in a way that will produce better service can hardly be found to be inconsistent with the public interest." This statement was made in the face of carrier opposition which was grounded, as in the cases above cited and others, on the objection that acquisition of the rights by Powell would create an entirely new operation in active competition with and to the detriment of existing carriers.

At a matter of fact, in all such cases it was tacitly assumed or conceded or actually declared that a change in the pat-

tern of operations would necessarily result from acquisition of physically connecting routes.

The first decision of Division 4 (March 6, 1950) and the antecedent decision of the examiner in the case at bar were in entire harmony with the principles, propositions and decisions in all the cases above referred to. The Division found consistency with the public interest in the proposed provision of single-line through service between points presently served by Shein's in their regular-route operations and those in the irregular-route territory to be acquired from vendors and in the benefit to shippers and consignees from the elimination of interchange at Philadelphia and the reduction in transit time of one day. These findings were made in the face of the Division observations that competition for through traffic would undoubtedly be intensified, that vendors had not interchanged traffic with any carrier, that their operations had been of little competitive significance, and that the added competition of vendees would very likely cause existing carriers to lose some traffic and revenue.

These findings were predicated upon a further underlying finding that "The evidence shows clearly that vendees intend to preserve the separate nature of the regular-route and irregular-route operating rights * * *." Furthermore, they were made in the light of Phillip Shein's testimony (Plaintiffs' Ex. P-1, Tr. 42-55) that Shein would probably serve the two Townships out of its large Philadelphia and Wilmington terminals at which maintains 30 and 6 registered vehicles, respectively, that Shein would be prepared to offer service as required into Maryland, Delaware, and the District of Columbia, and to serve all points within the Stillwell territory, and that the unsatisfactory interchange at Philadelphia would be eliminated. To put it succinctly, Shein proposed to continue the service offered by Stillwell as well as to conduct a through service without interchange to and from points in the Stillwell territory.

In reversing itself in the decision of July 24, 1950, Division 4 committed the errors of which complaint was made to the court below and is now made here. And, of course, we assert and complain of error on the part of the court in sustaining the order of July 24, 1950. The reversal is erroneous because grounded upon findings of fact having no support in the evidence. It follows that the action of the court in sustaining the Commission in this regard was likewise erroneous.

In support of its reversing order of July 24, 1950, the Division made two new and significant findings: (1) it found that Shein was proposing a radical change in the pattern of operations, that the use to which Shein proposed to put the rights to be acquired would bear little, if any, resemblance to the service provided by vendors and would result in the institution of an essentially new and different service by vendees, and (2) that such service would come in competition with existing carriers in an already highly competitive territory and would have a "probable" adverse effect on such carriers. From these two findings the Division deduced that the transaction could not be found to be consistent with the public interest without evidence to show that it would supply a public need not now being adequately met by other carriers.

We do not concede that Shein is proposing a radical change in the pattern of operations, since, as we have shown, Shein intends to continue to serve Stillwell's territory and patrons, and, with respect to the institution of through service, to do no more than substitute such service for the existing interchange service (which under Commission and Court decisions clearly could be done lawfully), a definite advantage to the shipping public. Neither Division 4 in its last report nor the court below made any reference whatever to the proposed continuance of the Stillwell service, but both laid stress and emphasis upon the evidence relating

to inauguration of the through service and the elimination of interchange at Philadelphia.

Assuming that there would be such a change in the pattern of operations, it by no means follows that the mere change could rightly be deemed, regarded or held in and of itself to be inconsistent with the public interest. The substitution of a single-line service for an interchange service is *prima facie* a public benefit and consistent with its interest. Knowing this full well, the Division was driven to the untenable position it took, that of finding that the service would have a "probable" adverse effect upon existing carriers operating in an "already highly competitive" territory. We respectfully submit that there is not a scintilla of evidence in the record proving or tending to prove that there will be *any* adverse effect upon existing carriers or that Shein's proposed service would be rendered "in an already highly competitive territory." The most that the record shows is that some half dozen carriers would be competing with Shein's new service in one or more unknown respects (Ex. P-1, Tr. 88). The extent of the competition or the possible effect of the consummation of the proposed transfer upon the competitors is left entirely to conjecture. Whether the competitors transport the same commodities or serve the same points or territory to be served by Shein is not shown. Whether they are financially strong or weak carriers, whether they are aggressive or otherwise in getting and keeping business, whether Shein could lure away any of their customers, whether they desire to continue to handle interchange traffic with Shein, whether such continuance would be profitable or unprofitable to them, whether Shein could divert even as little as one pound of freight from them, or whether Shein's service would be superior to theirs and hence more attractive—none of these considerations are the subject of any evidence in this record. The Division admitted as much when it stated in its report

of March 6, 1950, that "In the absence of evidence by intervenors, however, showing how they would be affected by the transaction, there is no basis for a finding that their service is adequate or that it would be seriously affected by the proposed operations of vendees." This statement was neither modified nor retracted in the Division's later decision.

This unsupported finding is essential as a foundation for the ultimate finding that the transaction could not be found to be consistent with the public interest. There is no other respect in which the transaction was declared to be or could be inferred as being inconsistent with that interest. Certainly Shein's proposal to offer local service in continuance of that offered by Stillwell could not be viewed as inconsistent with the public interest. Nor could the substitution of single-line for multiple-line service and the elimination of interchange lead to any conclusion other than consistency with the public interest. Hence the Division had to resort to the unfounded findings in question in order to arrive at the finding that plaintiffs had failed to establish consistency with the public interest by proof of public need.

Such error by the Commission calls for judicial condemnation and remand of the case to the Commission for disposition in accordance with law.

> "A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction'."
>
> *Interstate Com. Com.* v. *Louisville & Nashville R. Co.* (1913), 227 U. S. 88, 92, 57 L. Ed. 431, 434.

> "To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action."
>
> *B. & O. R. Co.* v. *United States* (1924), 264 U. S. 258, 265, 68 L. Ed. 667, 674.

Since the trial court sustained this erroneous and arbitrary action of the Commission, it too fell into such error as to call for reversal of its decree. In its apparent eagerness to support the Commission's action, the court disregarded or overlooked its duty under Section 10(e) of the Administrative Procedure Act (5 U. S. C. A. 1009(e)). It is there prescribed that the court shall (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, (3) in excess of statutory jurisdiction, authority or limitation or short of statutory right, (5) unsupported by substantial evidence in any case * * * reviewed on the record of an agency hearing provided by statute, or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

It is then also provided that in making the foregoing determinations, the court shall review the *whole record* or such portion thereof as may be cited by any party. When agency action is charged and asserted to be without foundation in the evidence or unsupported thereby, it then becomes the court's duty to examine the entire record to determine whether the substantiality of all the evidence, pro and con, supports agency action challenged. And this includes consideration of the findings of the hearing examiner who heard and had an opportunity to appraise the witnesses and their testimony as given. Universal Camera Corp. v. United States (1951), 340 U.S. 474, 487, 490, 493, 495, 95 L. ed. 456, 467, 468, 470, 471. In the case at bar the court apparently completely disregarded the examiner's report, a copy of which is attached to the complaint as exhibit C, or if it did consider it, gave it no weight in connection with the question as to whether Shein proposed a "radical" change in the pattern of operations. Further,

and more serious, was the court's failure on that point to consider *all* of Phillip Shein's testimony instead of pinpointing that which was thought to lend support to the Commission, and its failure to observe the absence in the record of any evidence to support the Commission's finding concerning the extent of the competition to confront Shein and the "probable adverse effect thereon" of its proposed through service. It is quite clear from the opinion that the court was interested only in evidence favorable to the Commission's position.

The court mistakenly succumbed to the fallacious argument and its equally fallacious implications that since Shein would have to prove convenience and necessity were it applying for a certificate for the rights it seeks here to acquire, it should be required to make the same showing in this acquisition proceeding. The fallacy is apparent when we consider that Congress provided for transfer of operating rights authorizing service for which need had already been shown in obtaining the certificate; and that the statutory standard in cases of applications for approval of such transfers is "consistency with the public interest" and not "public convenience and necessity," which are materially different standards. Compare section 207(a) in respect of common carriers, and section 209(b) applicable to contract carriers. Common carriers and others are constantly acquiring operating rights by purchase, and with Commission approval, for the very reason that they could not and do not wish to undertake to prove a need for the through service they wish to offer under the acquired rights. Every such acquisition of connecting line rights is for this purpose and with the specific intent and purpose to establish a new through-line service.

Before closing, we deem it appropriate to touch upon the trial court's obvious conviction that Shein was and is

proposing to inaugurate and maintain an unauthorized *regular-route* service under the *irregular-route* Stillwell rights. Although Division 4 in its report of July 24, 1950, declared, without any discussion of pertinent evidence, that there would be a radical change in the operations, it did not have the hardihood to accuse Shein of a proposal to conduct operations which would be illegal because they would be *regular* route in nature. It could not have been so on the evidence in this record because, as is clear from the Brady case, 47 M.C.C. 43, referred to by the court, there are too many factors to be considered in determining whether operations are regular or irregular route in character, and the record contains no evidence relating to such factors. It is quite plain from the Brady decision that Shein's proposed single-line operation could attain a certain degree of regularity or periodicity between any two given points without becoming regular route so long as there was adherence to call-on-demand service. 47 M.C.C. 44, 46, 60, 62. And, as pointed out in the Brady case, when such operations approached regular route characteristics, Shein would be at liberty and under obligation to apply to the Commission for conversion of its authority to regular route service. 47 M.C.C. 40. In any event, the court fell far short of demonstrating a regular route character of the proposed operations in the light of the tests or criteria set up in the Brady case.

Ordinarily, the right of one person to sell and another to purchase property, or rights or interests therein, is an inherent and fundamental right. Such a right may be denied lawfully only in the exceptional cases when the result of the exercise thereof has been shown to be contrary to the public interest. Stearns, et al. v. United States, 87 F. Supp. 596. To deny such a right without any or any substantial evidence to support the denial and without

adherence to the standards provided in a statute which grants a conditional right of denial, is to withhold from the prospective buyer and seller the fundamental guarantees of due process of law. We respectfully submit, therefore, for the reasons stated, that the Commission erred grieviously in its final order, and that the Court below was equally in error in upholding the Commission without reviewing the order in the light of the applicable statutory standards and on the whole record before the Commission.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 564-51

BENJAMIN P. SHEIN, HERMAN SHEIN, HOWARD M. SHEIN, JULES Y. SHEIN, PHILLIP SHEIN and SAMUEL SHEIN, Partners, trading as SHEIN'S EXPRESS, and WESLEY STILLWELL, FRANK CHARLES LAXTON and CHARLES ROBERT LEWIS, JR., Partners, trading as WESLEY STILLWELL, *Plaintiffs,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

INTERSTATE COMMON CARRIER COUNCIL OF MARYLAND, INC., *Intervener.*

Opinion

(Filed December 17, 1951)

Before McLaughlin, Circuit Judge; Forman, Chief District Judge, and Madden, District Judge

APPEARANCES:

Albert B. Kahn, Esquire; N. N. Schildkraut, Esquire, Attorneys for Plaintiffs; Jack Garrett Scott, Of Counsel.

Grover C. Richman, Jr., United States Attorney by Stuart B. Rounds, Jr., Assistant United States Attorney; Robert W. Strange, Special Assistant to the Attorney General, Attorneys for United States of America.

Daniel W. Knowlton, Chief Counsel; Edward M. Reidy, Associate Chief Counsel, Attorneys for Interstate Commerce Commission.

Frank M. Thompson, Jr., Esquire, Attorney for Intervener; James J. Doherty, Of Counsel.

MADDEN, *District Judge:*

This is an action to enjoin, set aside and annul two orders of the Interstate Commerce Commission, hereinafter called Commission, brought under Sections 1336, 2284 and 2321-2325, Title 28 U.S.C.A., wherein the Commission, in one order dated July 24, 1950, denied an application of plaintiff, Shein's Express, hereinafter referred to as Shein, a partnership operating as a common carrier by motor vehicle in interstate commerce, to purchase under Section 5(2) of the Interstate Commerce Act [1] certain operating rights of plaintiff, Wesley Stillwell, another partnership hereinafter called Stillwell, operating as a common carrier by motor vehicle and in the other order dated April 2, 1951 denied plaintiffs' petition for reconsideration, by the entire Commission.

The United States has been made a party defendant as required by Section 2322, Title 28 U.S.C.A., and the Interstate Common Carrier Council of Maryland, Inc.,[2] has intervened.

Shein brothers, holding equal interests in the partnership, operate in interstate or foreign commerce, pursuant to a certificate in No. MC-80504, as a motor common carrier of general commodities, with exceptions, over regular routes, between New York City and Wilmington, Delaware, principally via Newark and Trenton, New Jersey, and Philadelphia, serving all intermediate and certain off-route points.

Stillwell operates in interstate or foreign commerce, pursuant to certificates in Nos. MC-93789, MC-93789 (Sub-No. 2), and MC-93789 (Sub-No. 3), as a motor common carrier (1) of general commodities, excepting, among others, household goods as defined in Practices of Motor Common Carriers of Household Goods, 17 M.C.C. 467, over irregular routes, between points in Aston and Middletown Townships, Delaware County, Pennsylvania, on the one hand, and, on

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[1] 49 U.S.C.A. 5(2).

[2] An association of nine motor carriers of property including the Baltimore Transfer Co. of Baltimore City and the Davidson Transfer & Storage Co., operating over routes extending generally between Baltimore, Maryland, and New York, New York, via Philadelphia, Pennsylvania.

the other, points in New Jersey, Delaware, Maryland, the District of Columbia, and those in the New York commercial zone as defined in New York, N. Y., Commercial Zone, 1 M.C.C. 665, (2) of general commodities, with exceptions, over a regular route, between Fernwood and Wawa, Pennsylvania, over U. S. Highway 1, serving all intermediate points and eight off-route points, restricted to service which is auxiliary to, or supplemental of, railway service, and (3) of household goods, as previously defined, over irregular routes, between Media, Pennsylvania and points within 15 miles thereof, on the one hand, and, on the other, points in Massachusetts, Rhode Island, North Carolina, Virginia, Maryland, New Jersey, Delaware, the District of Columbia, and those in a defined area in New York.

Shein proposed to purchase that portion of Stillwell's operating rights under the certificate in No. MC-93789 (Sub-No. 2) which authorizes the transportation of general commodities between points in Aston and Middletown Townships, Pennsylvania, on the one hand, and, on the other, points in Delaware, Maryland, and the District of Columbia.

It will be well to keep in mind that the present service performed by Stillwell and sought to be transferred to Shein, as granted by the Commission under MC-93789 (Sub-No. 2), is an irregular route service.

It might be well also to point out that an application, likewise under Section 5(2), wherein authority was sought by Stillwell to sell its rights in MC-93789 (Sub-No. 2) covering the transportation of general commodities between points in Aston and Middletown Townships, on the one hand, and, on the other, points in New Jersey and those in the New York Commercial zone to the Houff Transfer, Inc., was denied by the Commission.[3] It, however, is not a part of this record and does not constitute a part of this proceeding.

A hearing was conducted upon the application by an examiner of the Interstate Commerce Commission, at which time plaintiffs and interveners appeared through counsel. Plaintiffs produced two witnesses who testified concerning the proposed transfer, to wit, Wesley C. Stillwell, repre-

[3] Houff Transfer, Inc.—Purchase—Stillwell, 56 M.C.C.

senting the vendor partnership, and Phillip Shein, representing the vendee. A third witness, a Certified Public Accountant, testified solely about the accounting practices and capital structure of Shein.

The examiner submitted a report and recommended an approval of the transfer, conditioned upon certain financial arrangements which are of no moment here.

Exceptions, with a request for oral argument, were filed by the interveners to the report. Oral argument was denied and on March 6, 1950 the Commission, through Division 4, made a report which in substance adopted the recommendations of the examiner, with a few minor changes, approving the transfer therein sought.

On April 6, 1950 the intervener sought a reconsideration of the matter and a denial of the application. Plaintiffs thereupon replied.

On July 24, 1950, the Commission, through the same division, namely Division 4, and the same Commissioners "Reopened the proceedings for reconsideration on the record as made" and reversed itself, denying the application.

Plaintiffs attack the action of the Commission as being arbitrary and capricious and not founded upon any substantial evidence and also upon a mistaken theory of the law that the burden was upon the applicant-plaintiffs to prove the need of such transfer in the public interest.

In these matters, where this statutory court sits in effect as a reviewing court, we cannot substitute our judgment for that of the Commission but must follow the rule universally laid down, as follows:

> "The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done."

United States, et al. v. Pierce Auto Freight Lines, Inc., 327 U. S. 515-535; Interstate Commerce Commission v. Mechling, 330 U. S. 567-574; and United States v. Chicago Heights Trucking Co., 310 U. S. 344-352.

Plaintiff argues that the Commission having reported favorably on the application, upon the evidence before it

and the examiner, cannot upon reconsideration reverse its position and deny the application without any new evidence. We hold this argument to be without merit.

The very nature of our American practice has been that an aggrieved party may always have opportunity to say, "You made a mistake". If upon deeper research, fuller reflection and consideration the judicial or quasi-judicial body would see a mistake but persist in it, this would amount to mere obstinacy or stubbornness and foster the highest form of injustice.

This view was expressed by Chief Judge Parker of the Fourth Circuit in the matter of Beard-Laney, Inc. v. United States, 83 F. Supp. 27, at page 33 where he said:

> "The rules to be applied in reviewing the Order of the Commission are not different because that Order resulted from a reversal of a prior decision of the hearing division upon a petition for rehearing. The fact that a rehearing was granted shows that the questions involved were carefully considered and the ultimate decision of the division which received the approval of the Commission was the final and definitive action of the Commission which is what we are authorized to review; and it is to be reviewed in the same way and under the same limitations as other reviewable orders. We may not substitute our judgment for that of the Commission because upon a rehearing and fuller consideration of the facts it has arrived at a different conclusion from that which its hearing division had first expressed."

The plaintiffs also argue that the Commission's holding in the present case is inconsistent with its ruling in what is known as the Powell case[4] and consequently unlawful. We disagree with plaintiffs in the application of the Powell case here on both the facts and the law. Firstly, in the Powell case it was determined that the vendor was possessed of operating rights over two separate but connected regular

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[4] *Byers Transportation Co.* v. *United States*, 48 F. Supp. 550; *Byers Transportation Co.* v. *United States*, 49 F. Supp. 828.

routes, and therefore the purchaser was not planning or proposing to furnish a service any greater in scope than the vendor had the right to do pursuant to its grant, under the grandfather clause. In the case now before the Court, the Commission found that the vendee, Shein, proposed a radical change in the pattern of operations conducted by vendor, Stillwell.[5] Secondly, it has been established that

[5] See Report 56 M.C.C., page 714, paragraph 3.

the Commission's ruling need not be consistent in all respects. See Beard-Laney v. United States, supra, at page 33:

> " 'This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.' Virginian Ry. Co. v. United States, 272 U. S. 658; and Interstate Commerce Commission v. Union Pacific R. Co., 222 U. S. 541."

It is so well established that the citation of authorities is unnecessary, that if Shein had applied to the Commission for a certificate of convenience and necessity to operate over a regular route in this territory that the burden would have been upon it (Shein) to prove, by competent evidence to the satisfaction of the Commission, that the public interest required such service. May it then attempt to attain this end result indirectly by the purchase proposed here without carrying the burden of proof incumbent upon it if it was attempted directly? We think not and we think that the Commission applied the right rule of law in reaching its conclusions.

Lastly, was there substantial evidence before the Commission to warrant their determination that the purchaser (Shein) proposed to furnish a radically changed service from that performed by Stillwell.

In consideration of this point it might be well to point out the difficulties besetting the Commission and the reviewing courts in distinguishing between regular and irregular routes. Circuit Judge Collet in Brady Transfer v. U. S., 80

F. Supp. 110, affirmed per curiam, 335 U. S. 875, #397, speaking of these difficulties said at page 115:

> "And it (the Commission) disavowed, and we think very properly, the intention or even the possibility of laying down any hard and fast inelastic yardstick which could be applied to all cases for the determination of what class a particular operation fell into. It did in its report in this case announce eight factors or criteria, some or all of which might in an individual case exist and have a relevant bearing on the determination of the type of operation. It is clear from the Commission's order that there was no intention to assert that any one of those eight factors would necessarily be controlling. On the other hand, it is equally clear that the Commission was undertaking to give such assistance as it could to the industry in announcing these factors in order that so many of them as might exist in any given case might be considered collectively in determining the type of operation."

It is unnecessary to set forth here the factors established by the Commission. Suffice it to say that they can be found either in "Classification of Motor Carriers of Property" 2 M. C. C. 703 or in the footnotes of the Brady v. U. S. decision, supra, 80 F. Supp. running from page 115 to page 117 inclusive.

Summarizing these factors Judge Collet went on to say:

> "We deem it adequate to observe that there is, as the Commission found, a clear distinction in type between the indiscriminate, coincidental, non-scheduled, unperiodical, itinerant, ambulatory service of an irregular route carrier and the operation of a regular route certificate holder over a carefully specified route to only specifically authorized points on that route on schedules published and filed, with the obligation on the part of the carrier to give, and the responsibility on the part of the Commission to compel, the carrying out of that operation to such an extent as the convenience and necessity of the public justified."

In this light let us look at the stipulated condensation of the testimony and record before the Commission. It is true that when the witness, Phillip Shein, testified and was speaking generally he said:

> "We are prepared to offer a service into Maryland, Delaware and the District of Columbia that is requested by our shippers. We will serve them as they require the service. *It is not our intention to establish any regular routes but this is to be strictly an irregular route operation.*" (Emphasis supplied) Plaintiffs' Appendix A, page 6.

However, when pressed on either direct or cross examination for a more specific description of the type of service proposed you find this kind of testimony:

> "If we obtain these rights, the truckload or two truckloads interchange at Philadelphia would be entirely eliminated. We have experienced delays in the transfer of freight at Philadelphia and the ultimate delivery at point of destination. If we move the freight through without interchange, we could save as much time as almost a day. On the interchange movements, interchange was effected by the physical transfer of the freight from one vehicle to another at Philadelphia." Plaintiff's Appendix A, page 7.
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> "All traffic that originates on a given day at New York or Newark moves to its destination that day. No traffic is held up at any time. If we obtain the rights involved here, our operating people have told me that it would take them approximately seven or eight hours from New York to Baltimore from the time it leaves the terminal, and any shipments originating at any points between New York and Baltimore would take lesser time, of course, places like Trenton, Philadelphia, or Wilmington. We hope to provide overnight service. That is being done by other carriers, and I don't think that, if an overnight service is required, there is any reason why we couldn't perform it. Phila-

delphia would be a consolidating point for the Stillwell freight." Plaintiffs' Appendix A, page 8.

"If we should get a call for a traffic movement from Cumberland or Hagerstown to New York or Trenton or Newark, (62) we would probably get a local terminal carrier to make the pick-up for us. There are many of them in Baltimore. On the other hand, if we happen to have a load into Cumberland or Hagerstown, and there is a load coming back, we would pick it up. We have made no decision as to stationing any equipment in Aston or Middletown." Plaintiffs' Appendix A, page 8.

"It is not correct that of these two truckloads daily into Philadelphia there are from one to two truckloads interchanged for Baltimore every day. The one to two truckloads I mentioned came from all of our territory, over all of our routes and not just from New York. All of the traffic that we interchange that I am speaking of is traffic that originates at points north of Philadelphia on our regular routes. It is brought into Philadelphia daily and we interchange at Philadelphia, generally for Baltimore. One of the principal reasons why we want the Commission to grant us this authority is to permit us to eliminate this interchange." Plaintiffs' Appendix A, page 9.

"If we picked up a particularly good shipper in New York who would give us ten or twelve truckloads daily, we would handle those truckloads the same way, directly through to common gateway points and on through to Baltimore. That would be the most practical way of doing it. I don't know whether this is the way we would do it. That would rest in the hands of our operating people but I assume that would be the way they would move it. We have made no decision as to how many solicitors we would intend to have in Baltimore. I know definitely that we have only regular route rights now and that we are buying irregular route rights and paying $20,000 for them." Plaintiffs' Appendix A, page 10.

It is easy to see, therefore, why on closer scrutiny the Commission determined that Shein was seeking something vastly different than that which Stillwell had. For the Commission to accept Shein's plain statement that it would be the same irregular route service, in the face of his other testimony, would be playing the part of the ostrich and attempting to ignore the obvious.

This view is borne out by the findings in Brady v. U. S., supra, and very well expressed by Judge Paul in Falwell v. U. S., 69 F. Supp. 71, affirmed per curiam, 330 U. S. 807, #1091, when he was speaking of the refusal of the Commission to approve the sale of certificate which would in effect join a regular and irregular route service, and said at page 77:

> "To do so would grant to holders of irregular-route certificates a free hand to operate as they choose; to operate irregularly over such parts of the territory as they might choose and to establish regular-route operations where they so desired. An irregular route certificate would be authority to conduct either or both forms of operation at the carrier's choice. It would nullify the distinction between regular and irregular route carriers and would nullify the power of the Commission to establish and maintain comprehensive and efficient service adjusted to the public need and free from destructive competition between carriers."

Plaintiffs also complain of the action of the Commission, of April 2, 1951, denying their petition for reconsideration by the entire Commission of the order by Division 4, of July 24, 1950, herein complained of. The matter of a rehearing is strictly a matter of discretion with the administrative body, in this case the Interstate Commerce Commission, and not for a reviewing court. See I. C. C. vs. Jersey City, 322 U. S. 503, and the cases cited by Mr. Justice Jackson on pages 515, 516, 517 and 518.

We, therefore, conclude that the Commission applied the right rule of law and had substantial evidence to support its ruling; that there would be a radical change in the pattern of the operations; that there would be a probable

adverse effect which this would have on competing carriers; that there was a lack of evidence to show that the transaction would supply any need of the public not now being adequately met by other carriers; and therefore concluding that the granting of the transfer would not be consistent with the public interest. The refusal of the Commission to grant reconsideration by the entire Commission was within its sound discretion and we find no abuse thereof.

The bill of complaint herein will accordingly be dismissed.

(S.) THOMAS M. MADDEN, *J.*

Filed Dec. 17, 1951.

APPENDIX "B"

Statutes Involved

Section 5(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or
>
> (ii) * * *

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking au-

thority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of Paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed

transaction; and (4) the interest of the carrier employees affected.

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Section 5(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

(10) Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) of this section where the only parties to the transaction are motor carriers subject to chapter 8 of this title (but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1(3) of this title), and where the aggregate number of motor vehicles owned, leased, controlled, or operated by such parties, for purposes of transportation subject to chapter 8 of this title, does not exceed twenty.

Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) of this section where the only parties to the transaction are street, suburban, or interurban electric railways none of which is controlled by or under common control with any carrier which is operated as part of a general steam railroad system of transportation.

(13) As used in paragraphs (2)-(12) of this section, inclusive, the term "carrier" means a carrier by railroad

and an express company and a sleeping-car company, subject to this chapter; and a motor carrier subject to chapter 8 of this title; and a water carrier subject to chapter 12 of this title.

Section 207(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.